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No. 83-387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES W. PUTNEY,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that the Adjustment Board has exclusive jurisdiction over the minor dispute claim against the employer railroad, which jurisdiction cannot be avoided merely by alleging that the union breached its duty of fair representation.

2. Whether the Court of Appeals correctly held that, absent an allegation of collusion or conspiracy between a railroad and a union, a railroad employee cannot institute in the federal courts a breach of contract action for a minor dispute claim.

3. Whether, in a minor dispute arising under the Railway Labor Act, the Court of Appeals properly limited the application of Labor Management Relations Act precedents because of the Railway Labor Act's jurisdictional provision requiring the arbitration of minor disputes before the Adjustment Board.

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v.

CONSOLIDATED RAIL CORPORATION

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Consolidated Rail Corporation ("Conrail") adopts the facts delineated in the United States District Court's opinion (Petitioner's Appendix at 6-9), adding the following facts which are pertinent to the lower court's determination of the exclusive jurisdiction of the Adjustment

Board over minor disputes.

James W. Putney ("Petitioner") was disqualified from his supervisory position of yardmaster with Conrail for cause in accordance with the applicable bargaining agreement. See Petitioner's Court of Appeals Brief, Joint Appendix "JA") 12. Petitioner's union, the Railroad Yardmasters of America (the "Union"), appealed Petitioner's disqualification in accordance with the grievance procedures of the collective bargaining agreement. Petitioner retained counsel and requested that the Union withdraw as his representative. Thereafter, Petitioner's appeal at the third stage was denied. The Union then advised Petitioner that:

> ...you now have six (6) months from the date of the denial in which to initiate proceedings before an appropriate adjustment board established under Section 3 Second of the Railway Labor Act, as amended. Failure to do this means the case would be barred any further handling, as prescribed by Rule 4-6-1(j) of our scheduled agreements.

Petitioner did not appeal his disqualification to the Adjustment Board for a final arbitrative determination. Instead, after the expiration of the six month period, he filed this action in District Court, alleging that Conrail breached the collective bargaining agreement and that the Union breached its duty of fair representation. Petitioner's Complaint did not allege collusion between Conrail and the Union.

The District Court granted Conrail's Motion to Dismiss the Complaint for lack of subject matter jurisdiction, holding that Petitioner's Complaint involved only a "minor dispute" under the Railway Labor Act ("RLA") over the interpretation of a collective bargaining agreement. Therefore, the Adjustment Board had exclusive jurisdiction to resolve the dispute.

The Union's Motion to Dismiss was denied on other grounds, and the claim

against the Union remains pending before the District Court. Final judgment was entered dismissing the claim as to the railroad.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's dismissal of Petitioner's contract claims against Conrail because of the exclusive jurisdiction of the Adjustment Board. The Court of Appeals noted that Petitioner's failure to allege "collusion, conspiracy, or implication of the employer in wrongdoing of the union" limited him to pursuit of his contract claim before the Adjustment Board. The Court relied, in part, on Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 323 (1972), and noted that Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), which was decided under the Labor Managment Relations Act ("LMRA"), is inapplicable to RLA minor disputes.

REASONS FOR DENYING THE WRIT

This case involves no questions of law that are novel or worthy of review. The decisions below are consistent with prior decisions of this Court and involve no substantial issues in dispute among the circuits. Therefore, the petition should be denied.

Petitioner's only claim against Conrail involves a minor dispute, which this Court repeatedly has stated must be resolved by adherence to the exclusive arbitration procedure mandated by the Railway Labor Act. Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 94, rehearing denied, 439 U.S. 1135 (1978); Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972). Petitioner's reliance on non-Railway Labor Act precedents is misplaced because of the RLA's unique mandatory procedures for the resolution of breach of contract claims such as that of Petitioner.

SUMMARY OF ARGUMENT

1. This case involves a minor dispute under the Railway Labor Act. Such minor disputes are within the exclusive jurisdiction of the National Railroad Adjustment Board. Awards of the Adjustment Board are final and binding, subject to judicial review only on limited bases set forth in the Railway Labor Act, none of which are advanced by Petitioner here.

2. A minor dispute claim against a railroad employer and a fair representation claim against a union are two separate matters, dealt with separately by the Adjustment Board and the federal courts. An employee with only a fair representation claim against a union cannot also litigate a minor dispute case against the employer in federal court. Although Petitioner now argues that allegations of collusion between the Union and Conrail confer jurisdiction over Conrail, Petitioner failed to allege collusion in his amended and corrected Complaint. Even if collusion

had been alleged, the better reasoned cases hold that the federal courts do not have jurisdiction over the minor dispute claims against a railroad employer.

3. Cases decided under the LMRA are inapplicable to issues of federal court jurisdiction over a railroad employer in a RLA minor dispute becasue "[t]he language of the RLA differs materially from the language of the LMRA and mandates a different result." Court of Appeals Opinion, JA 4. The Court has emphasized the unique character of labor relations udner the RLA, and cautioned against reference to LMRA cases when deciding cases brought under the RLA.

ARGUMENT

I

THE NATIONAL RAILROAD ADJUSTMENT BOARD HAS EXCLUSIVE JURISDICTION OVER A "MINOR DISPUTE" UNDER THE RAILWAY LABOR ACT

The U.S. Court of Appeals for the Fourth Circuit correctly affirmed the

District Court's dismissal of Petitioner's Amended Complaint against Conrail because the Complaint states only a "minor dispute."

Minor disputes are within the exclusive jurisdiction of the National Railroad Adjustment Board. The holding was clearly in harmony with the decisions of this Court and is settled law.

Petitioner's grievances and claims for breach of contract create a classic "minor dispute," as defined by the RLA and as applied in numerous cases, e.g., Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 94, rehearing denied 439 U.S. 1135 (1978), Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972).

It is well established that minor disputes under the RLA must be processed in the usual manner to the highest carrier officers designated to handle them and ultimately are appealable exclusively to the Adjustment Board. Railway Labor Act,

45 U.S.C. §153, First(i). In Andrews, 406 U.S. at 325-26, this Court held that the courts lack jurisdiction to adjudicate a discharged railroad employee's minor dispute. The Court clearly indicated that the Adjustment Board was the employee's exclusive recourse. 406 U.S. at 322. ("[T]he notion that the grievance and arbitration procedures provided for minor disputes in the [RLA] are optional, to be availed of as the employee or the carrier chooses, is no longer good law.").

This Court, in Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 93-94 (1978), a per curiam decision, emphatically reiterated the exclusive jurisdiction of the Adjustment Board, and identified only three narrow statutory grounds on which Adjustment Board awards and orders are subject to judicial review. Those provisions deal with court review or enforcement of Adjustment Board awards, and come into play only when an

award--otherwise "final and binding"--has been issued. Railway Labor Act, 45 U.S.C. §153, First (m), (p), and (q). On such review the district courts' power is only to enforce, set aside, or remand an award to the Adjustment Board for further action. Petitioner has not urged any of these three bases for federal court jurisdiction of his claim; nor has Petitioner challenged the District Court conclusion that the dispute between Conrail and Petitioner was a minor dispute.

Petitioner voluntarily chose not to pursue his minor dispute before the Adjustment Board. Apparently upon the advice of private counsel, and contrary to the recommendation of his Union, Petitioner decided to forego the administrative route. Petitioner's choice does not create jurisdiction in the federal court. The Railway Labor Act recognizes the right of claimants to be represented by counsel before the Adjustment Board. Railway Labor

Act, 45 U.S.C §153, First(j). Individuals may make such a choice on notice to the Union. Elgin, Joliet & Eastern Railway Co. v. Burley, 327 U.S. 661, 666 n.9 (1946). The retention of private counsel does not obviate Adjustment Board jurisdiction. It is beyond doubt that Petitioner's exclusive recourse was to the Adjustment Board. See, e.g., Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972); Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978); Harrison v. United Transportation Union, 530 F.2d 558 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976).

II

ALLEGATIONS BY A RAILROAD EMPLOYEE THAT HIS UNION BREACHED ITS DUTY OF FAIR REPRESENTATION DO NOT CREATE JURISDICTION IN THE FEDERAL COURT TO DETERMINE HIS MINOR DISPUTE WITH HIS EMPLOYER

In addition to alleging a minor dispute, Petitioner's complaint alleges

lack of fair representation by the union. A court has jurisdiction to hear an employee's claim against his union for breach of its duty of fair representation, but does not have jurisdiction over the underlying minor dispute claims against a railroad employer.

The essential rationale for the former jurisdiction is that the union has an implied statutory duty of fair representation and that the RLA does not give the Adjustment Board jurisdition to resolve union-employee disputes. Ferro v. Railway Express Agency, Inc., 296 F.2d 847 (2nd Cir. 1961).

The tests for employer involvement with invidious discrimination against employees by a union in a situation which might also involve a grievance are set forth in Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324 (1969). This Court held there that resort to an Adjustment Board might be obviated where

"the effort to proceed formally with contractual remedies would be wholly futile," 393 U.S. at 330, in cases where "no meaningful distinction can be drawn between discriminatory action in negotiating the terms of an agreement and discriminatory enforcement of terms that are fair on their face," 393 U.S. at 329. The allegations in Glover were that the union and the employer, for motives of racial prejudice, jointly ignored and misadministered the clear terms of the agreement by "schemes and contrivances to bar Negroes from promotion wholly because of race." 393 U.S. at 331. No such invidious joint action is even suggested here. Conrail simply disqualified Petitioner for cause, the union proceeded to handle grievance in the usual manner, and Petitioner chose to go his own way with counsel, rather than permitting the union to continue as his representative. Conrail had no involvement in any conspiracy or

invidious concerted action with the union, and none was alleged.

However, the rationale for federal court jurisdiction over the fair representation claim against the Union does not allow the courts to extend jurisdiction to the employer in the absence of invidious and unfairly motivated joint action. Claims against the Union and Conrail rest on entirely different bases and involve separate liabilities. Conley v. Gibson, 355 U.S. 41 (1957) and Czosek v. O'Mara, 397 U.S. 25 (1970) establish that the minor dispute claim against the employer and the fair representation claim against the union should be treated as two separate matters and can be dealt with separately by the Adjustment Board and the federal court.

In Bowen v. U.S. Postal Service, __U.S.__, 103 S.Ct. 588 (1983), this Court re-emphasized the separate liabilities of employers for breach of contract and unions

for failure to represent. Bowen pointed out that the Railway Labor Act allows an individual employee to go to an Adjustment Board, thus implying that that is the sole remedy of the employee. Bowen, ___U.S. at ___, 103 S.Ct. at 598, n.18. It also noted that in Czosek, the railroad had been dismissed at an early stage of the case, in view of the exclusive jurisdiction of the Adjustment Board.

None of the cases cited by Petitioner hold that an employee with only a fair representation claim against the union may, by virtue of that fact, litigate a minor dispute claim against the employer. Each of the cases cited by Petitioner involves allegations of joint action, collusion, or conspiracy between the union and the railroad, none of which are present in the instant case, that may establish a special nexus for consideration of jurisdiction over the employer.

Petitioner has not alleged

union-employer collusion or conspiracy in this case. He now argues that to allege collusion or conspiracy implicating the employer in the union's wrongdoing, the employee "need not state specific facts in support of [such] allegations. . ." Petitioner's Petition at p. 18. However, Petitioner not only failed to state "specific facts," he failed to make even general allegations of collusion, conspiracy, or implication in alleged wrongdoing. Petitioner corrected or amended his Complaint three times, but never included such allegations. Petitioner alleges in his Amended Complaint only that Conrail knew or should have known, upon proper investigation, of the unfair representation of the union, and that Conrail erred in processing the dispute. The Supreme Court has characterized collusive actions as those "tying the union and employer together." Czosek v. O'Mara, 397 U.S. at 30. Thus, as

both the District Court and the Court of Appeals held, Petitioner's Complaint lacks well pled allegations of collusion.

Even when collusion between the union and the employer is well pled, the better reasoned cases hold that the federal courts do not have jurisdiction of the minor dispute claim against the employer. See, e.g., Goclowski v. Penn Central Transportation Co., 571 F.2d. 747 (3rd Cir. 1977); Connor v. Brotherhood of Railway Airline and Steamship Clerks, AFL-CIO, 496 F.Supp. 154 (M.D. Pa. 1980). These cases recognize that (a) Andrews v. Louisville & Nashville Railway Co., 406 U.S. 320 (1972) expressly places jurisdiction over minor disputes exclusively with the Adjustment Board; (b) federal court jurisdiction is limited to the exceptions delineated in Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, rehearing denied, 439 U.S. 1135 (1978); and (c) the minor dispute action is distinct from the unfair representation

action and can be dealt with separately and fairly. A fundamental danger in permitting allegations of collusion to provide entry to the federal courts was noted in Connor, 496 F.Supp. at 157: "It does not make sense to hold that a plaintiff could bypass the Board and bring these disputes into court simply by alleging collusion between the union and employer."

III.

THE DISTINCTIVE STATUTORY PATTERNS OF THE LABOR MANAGEMENT RELATIONS ACT AND THE RAILWAY LABOR ACT RECOGNIZED IN REGARD TO JURISDICTION OVER THE EMPLOYER

Petitioner relies upon the LMRA cases, such as Vaca v. Sipes, 386 U.S. 171 (1967) and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), to open the federal court door to subject matter jurisdiction over the minor dispute action against the employer railroad. However, these cases are inapplicable to issues of federal court jurisdiction over an employer in a minor

dispute case under the RLA because "[t]he language of the RLA differs materially from the language of the LMRA and mandates a different result." Court of Appeals Opinion, JA 4.

This Court has emphasized the unique character of labor relations under the RLA:

> The Railway Labor Act is essentially an instrument of industry-wide government (citation omitted). The railroad world for which the Act was designed has been described as a state within a state.... Congress has not only carved this singular industry out of the [LMRA], but it has provided, by the RLA, techniques peculiar to that industry.

California v. Taylor, 353 U.S. 553, 565-66 (1957).

The Court has cautioned against reliance on LMRA principles in dealing with Railway Labor Act cases. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969).

29 U.S.C. §185 provides the federal courts with jurisdiction to resolve an LMRA employee's minor dispute claim based on a collective agreement against the employer

alone. See, e.g., Smith v. Evening News Association, 371 U.S. 195 (1962). There is There is no comparable jurisdictional provision under the RLA. In fact, the RLA provides for the exclusive administrative processing of an employee's minor dispute. See, e.g. Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972). The LMRA expressly excludes from its regulatory scheme "any person subject to the Railway Labor Act," 29 U.S.C. §152(2), and any individual employed by such person, 29 U.S.C. §152(3).

The judicial focus on exhaustion of administrative remedies in LMRA cases is appropriate because the statutory right of LMRA employees to have minor dispute cases adjudicated by the judiciary can be made conditional on a resort to administrative remedies if the employer and union so agree. On the other hand, in RLA cases, the courts have properly focused on the nature of the dispute because the

Adjustment Board has exclusive jurisdiction to resolve minor disputes, and, except for the three limited areas enumerated in Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978), the courts lack jurisdiction to resolve such breach of contract claims. Even after review under Sheehan, the courts are authorized only to enforce, set aside, or remand a case to the Adjustment Board.

Petitioner contends that the U.S. Supreme Court, in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), an LMRA case, intended to clarify earlier cases and eliminate doubts about federal court jurisdiction over the railroad employer in suits where unfair representation by the union was alleged. It is clear Hines does not affect applying RLA precedents. Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978), was decided by the U.S. Supreme Court without reference to Hines or any other LMRA cases, indicating the inapplicability of the Hines prcedent to

the RLA. On the contrary, Bowen v. U.S. Postal Service, took the occasion to point out again the separate position of railroad employees. ___U.S.__, 103 S.Ct. at 598.

In short, LMRA precedents are inapplicable to RLA cases for clear and purposeful reasons.

CONCLUSION

The petition for certiorari should be denied because the courts below applied a proposition on which the law is clear; there is no federal court jurisdiction under the Railway Labor Act over a minor dispute claim against an employer, nor is such jurisdiction established by the allegation of a breach of the union's duty of fair representation. A definite showing of invidious, unfair and discriminatory joint administration of a collective agreement must be made before any jurisdiction over the railroad employer can be established. No such showing is alleged or made here.

Petitioner's reliance on case law developed under the Labor Management Relations Act is misplaced because the distinctive statutory differences between the Labor Management Relations Act and the Railway Labor Act have been recognized by the Supreme Court and are well established in existing Supreme Court cases dealing with the subject.

Respectfully
submitted,

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I CERTIFY that on this day of , 1983, three copies of the above were mailed first class, postage prepaid, to John D.

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Steven A. Loewy

APPENDIX A

Listing Pursuant to Supreme Court Rule 28.1

Consolidated Rail Corporation has no parent company. It has the following:

Majority-Owned Subsidiaries

Buffalo Creek Railroad Company

Calumet Western Railway Company

Canada Southern Railway Company

Conrail Equity Corporation

Detroit River Tunnel Company

Detroit Terminal Railroad Company

Indiana Ha rbor Belt Railroad Company

Merchants Despatch Transportation Corporation

Niagra River Bridge Company

Pennsylvania Car Leasing Company

Penn Central Communications Company

Pennsylvania Truck Lines, Inc.

St. Lawrence & Adirondack Railway Company

Affiliated Companies

Akron & Barberton Belt Railroad Company

Albany Port Railroad Corporation

Belt Railway Company of Chicago

Chicago and Western Indiana Railway Company

Fruit Growers Express Company

Illinois Terminal Railroad Company

Lake Erie and Eastern Railroad Company

Lakefront Dock & Railroad Terminal Company

Monogahela Railway Company

Nicholas, Fayette & Greenbrier Railroad Company

Peoria and Pekin Union Railway Co.

Pittsburgh, Chartiers & Youghiogheny Railway Company

Terminal Railroad Association of St. Louis

Toledo Terminal Railroad Company

Trailer Train Company

Calpro Company

Delpro Company

Hamburg Industries, Inc.

Railbox Company